

Malpractice Claim Requires Proof of Damages

It is black-letter law that every actionable malpractice claim requires proof of actual damage proximately caused by counsel's negligence. Breaches of the standard of care are not per se actionable. Acts of negligence, without damages, are what Cardozo famously described as "negligence in the air." As has been restated countless times, "[t]he breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm — not yet realized — does not suffice to create a cause of action. ..." This point brutally (from the plaintiff's standpoint) or gloriously (from the defendant lawyer's standpoint) was illustrated recently when an appellate court reversed a \$574,000 verdict against a defendant lawyer based upon the premise that the proof of actual damages was, at best, pure speculation.

In *Filbin v. Fitzgerald*, 211 Cal.App.4th 154, 149 Cal.Rptr.3d 422 (Ct. of App. 2012), the defendant lawyer had represented landowners, a husband and wife, in an eminent domain proceeding until he quit or was discharged, depending on one's point of view, less than three weeks before the scheduled trial. The clients and their lawyer had reached an impasse with respect to the settlement value of the case because the clients, but not their lawyer, wanted to get a new appraisal. Replacement counsel, who would later represent the clients in the malpractice action, including the appeal, entered his appearance and the trial judge later pushed back the trial date.

Replacement counsel then engaged both the appraiser previously engaged by the original counsel/defendant lawyer and another appraiser. He requested that both appraisers make the "extraordinary assumption" that the property would undergo a rezoning that would prompt a dramatic increase in its value.

After the trial began, and while represented by replacement counsel, the clients settled with the county for a package worth about \$2.7 million. Thereafter they sued their original counsel, complaining about the manner in which he worked up the case, prepared his experts and otherwise represented them. They faulted him for not pursuing compensation for materials that were "stock-piled" on the property and for not pursuing a theory that rezoning was "probable."

Another aspect of their complaint concerned bad legal advice that the attorney allegedly had given. Under California law the owner in an eminent domain action must file a settlement demand and the public agency must file a settlement offer. After the jury verdict the court has the discretion to award litigation expenses, including attorney's fees, in favor of the property owners if it determines that their settlement demand was reasonable and that the public agency's offer was not, "all viewed in light of the jury verdict." The defendant lawyer incorrectly advised his clients that their statutorily mandated settlement demand must be for an amount "lower than the appraisal of [their] designated valuation expert. ..." Notwithstanding, the husband wanted to make a settlement demand for an amount in excess of the value opined by their valuation expert and this impasse led the defendant lawyer to petition for leave to withdraw.

The clients also complained about the petition to withdraw from the case. In their view the defendant lawyer could have avoided a hearing on the issue of his withdrawal. That would have avoided his making comments to the petition court that allegedly put his clients in a bad light for wanting to make a settlement demand in excess of what the lawyer thought was the legal limit. It would also have avoided the defendant lawyer's having made the same misstatement of law concerning the settlement demand. He simply could have filed a withdrawal of appearance when replacement counsel was entering his appearance. As a result of defendant lawyer's conduct, in his clients' view, the settlement was inadequate.

After a bench trial in the malpractice action the trial court found that "[husband had] engaged in unreasonable conduct with respect to the property, resulting in actual criminal prosecution and conviction, and that he harbored unrealistic opinions regarding the value of the property." The trial court also found that although the lawyer was mistaken in his belief that his withdrawal required leave of court, he had not breached the duty of care by seeking the hearing with respect to his proposed withdrawal. Notwithstanding, the trial court found in favor of the clients because the lawyer had misstated the law with respect to the settlement demand, which it characterized as "a point of great importance to [the husband]."

A three-judge panel of the California Court of Appeals, First District, Division 2, reversed. It found that the transcript of the hearing did not support the trial court's conclusion that the petition court had "accepted that incorrect statement of law as fact" or that it believed that husband "sought to deviate from the requirements of law" by wanting to make what the defendant lawyer incorrectly thought was an illegally high demand. In the view of the appeals court the petition court's comments "were to ascertain whether the attorney-client relationship had irretrievably ruptured, and to impress upon [husband] that if [his attorney] were discharged that there would be

Avoiding Liability



By Jeffrey P. Lewis

Jeffrey P. Lewis is a member in the Philadelphia office of the Pittsburgh-based law firm of Eckert Seamans Cherin & Mellott LLC. He serves on the PBA Professional Liability Committee.

continuance." The appeals court noted that at no time did the petition court say on the record that it accepted counsel's (mis)statement of the law as correct and, in fact, indicated on the record that it "had no idea whether the demand or the final offer that's been made is even in accordance with law." Moreover, the appeals court noted that the record contained nothing to suggest that the defendant lawyer intended "to deceive either [his clients] or [the petition court], or that [he] actually did so."

The appeals court concluded that the defendant lawyer had done nothing up until when the clients terminated him to cause the clients any harm. Therefore it found that none of the defendant lawyer's "strategy or tactical decisions ... can figure in the determination of whether [defendant lawyer] committed malpractice." As a result the appeals court concluded that the trial court incorrectly had found a causal nexus between the defendant lawyer's conduct and any purported harm sustained by his clients.

As a result — and here is the irony in this case — the appeals court suggested that if clients had sustained any harm, it was replacement counsel, who was also one of the lawyers who handled the appeal, who caused the harm because "new counsel's negotiating abilities were significantly inferior to those of [defendant lawyer]."

The lesson to take from this case is that where an attorney makes an error in the course of representing a client, even an egregious one, there is no malpractice claim unless that error caused actual, measurable damages.